MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-252

LAWRENCE E. BIESKI, ET AL., *Petitioners*

v.

EASTERN AUTOMOBILE FORWARDING COMPANY, INC., M & G CONVOY, INC., and HIGHWAY TRUCK DRIVERS AND HELPERS, LOCALS 107 AND 326, Unincorporated Associations Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Eastern Conference Automobile Transporters Joint Committee, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF EASTERN CONFERENCE AUTOMOBILE TRANSPORTERS JOINT COMMITTEE

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bile Forwarding Company, Inc. (herein Eastern). M & G did not purchase Eastern's assets, liabilities, ICC certificates, licenses, good will, accounts receivable or cash. Employees of M & G and Eastern were both represented by Respondent Local 107 (herein Union) and were both covered by the same collective bargaining agreement. That agreement was a multi-employer-multi-union contract covering employees employed in the transportation of automobiles in the eastern United States. Eastern's demise was the result of increased rail competition.

The Union presented a grievance involving the seniority of the M & G and Eastern drivers. Article 4, Section 3 of the labor contract states that any controversy over seniority shall be subject to the grievance procedure (J. A. 28-29). 1/ Article 6, Section 6 of the labor contract states that "any and all disputes, including interpretations of the contract provisions . . . shall be subject to the grievance procedure of this agreement" (J. A. 32). Sections 3 and 4 of Article 6 specifically state that a decision of the Grievance Committee shall be final and binding (J. A. 31). Article 4, Section 5 provides:

> Section 5. Mergers, etc.
>
> In the event that the Employer absorbs the business of another private, contract or common carrier or is a party to a merger of lines the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the grievance procedure (J. A. 30).

1/ "J. A." references are to the Joint Appendix filed in the Court of Appeals. References "-a" are to the Petitioner's Appendix which is attached to its Petition.

The Grievance Committee is composed of an equal number of employer and Union representatives (J. A. 30-31). In a particular case, the Grievance Committee panel consists of those employers and Unions who are not involved in the controversy (J. A. 85-86).

In its original decision, the Grievance Committee ruled that there was no absorption under the labor contract and, therefore, the Eastern drivers had no rights to jobs for seniority with M & G. This decision was reversed by the Third Circuit on July 28, 1968 which concluded that there was an absorption and the Grievance Committee should determine the seniority issue (13a-34a). The Third Circuit stated "the merits of this dispute are open to many rational solutions" (30a).

After the Third Circuit's decision, there were three hearings before the Grievance Committee. The hearing which is before this court was held on April 10, 1973 and the Grievance Committee decision was dated April 20, 1973. All parties and employees were represented and presented evidence and arguments before the Grievance Committee. None of the parties to the dispute were represented on the Grievance Committee which heard the case and there were no objections to the Grievance Committee panel (J. A. 306-311). There was disagreement whether company or terminal seniority should apply, but in

general, the Union and the Eastern drivers 2/ contended that they should be dovetailed with the M & G drivers based on the overall seniority of both groups (J. A. 321-325, 415-417, 426-428).

The M & G drivers urged that the Eastern drivers should go to the bottom of their seniority roster because they had sacrificed to make M & G profitable, whereas Eastern went out of business (J. A. 331-351). M & G submitted that it should not be required to credit the Eastern drivers with seniority they enjoyed with Eastern (J. A. 400).

The Grievance Committee ordered that M & G must offer jobs to all Eastern employees; that Eastern drivers shall go on the bottom of the M & G seniority list as of January 1964 when M & G first hired Eastern drivers, but ahead of new hires who were hired after January 1964; that Eastern drivers shall retain Eastern seniority for vacation benefits; and that the Eastern drivers who were Plaintiffs below shall receive credit for pension benefits as if they had been continuously employed by M & G (7a-12a).

The case went to the district court on M & G's motion to enforce the Grievance Committee decision of April 20, 1973. The Petitioner, Eastern drivers, raised 22 specific objections which were directed at the merits of the Grievance Committee decision (4a-5a). The district court found that there was no fraud or deceit which would nullify

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2/ Actually the Eastern drivers who were Plaintiffs below argued that only they should receive their Eastern seniority and benefits on the theory that the other Eastern employees accepted the original Grievance Committee decision in 1964 and did not participate in the litigation (J. A. 324-325).

the Grievance Committee decision and no lack of good faith or honesty of purpose on the part of the Union (3a, 5a; see also 20a, 31a). Accordingly, the district court refused to review the merits of the Grievance Committee decision and granted M & G's motion to enforce the arbitration award (6a).

The Court of Appeals for the Third Circuit affirmed the judgment of the district court without an opinion.

REASONS FOR DENYING THE WRIT

I. The decision of the Grievance Committee should not be reviewed on the merits absent fraud, collusion or a breach of the duty of fair representation. This proposition must be examined in the light of the district court's decision since there was no opinion written by the Third Circuit. The district court concluded that the Grievance Committee properly assumed jurisdiction and decided the seniority issue in accordance with its authority under the collective bargaining agreement. This conclusion is consistent with Article 4, Section 5 and Article 6, Sections 3 and 4 of the labor contract which gave the Grievance Committee the power, authority and discretion to make a final and binding seniority determination in the situation in which one employer absorbed another. The crucial finding of the district court was that there was no fraud, deceit or a breach of the duty of fair representation. In fact, the district court noted that the thrust of the Petitioners' objections to the Grievance Committee decision were not aimed at these issues but went to the merits of the dispute (5a). In these circumstances, the dis-

trict court refused the attempt of the Eastern drivers to enmesh it in the merits of the Grievance Committee decision, and accordingly, enforced the arbitration award.

The decision in this case is entirely consistent with the admonitions of this court. In the Steelworkers Trilogy, this court stated that:

> Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. §173(d), states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . . ." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full pay. United Steelworkers v. American Manufacturing Co., 363 U.S. 564, 566 (1960).

In order to give the Grievance Committee decision "full play" the courts must refrain from reviewing the merits of the decision because "plenary review by a court of the merits would make meaningless the provision that the Arbitrator's decision is final for in reality it would almost never be final." United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1960). The court emphasized that "the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's

construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Id at 599.

The criteria for arbitration as established by the Steelworkers Trilogy was applied to joint employer-union grievance committees by this court in 1963. Drivers Union v. Riss & Co., 372 U.S. 517 (1963). There this court held that "if . . . the award of the joint . . . committee is under the collective bargaining agreement final and binding, the district court has jurisdiction under §301 to enforce it . . ." Id at 519. This court added that "if the award at bar is the party's chosen instrument for the definitive settlement of grievances under the agreement, it is enforceful under §301. And if the joint . . . committee's award is thus enforceable, it is, of course, not open to the courts to reweigh the merits of the grievance." Id at 519.

Here the labor contract did not dictate how seniority disputes should be resolved in an absorption case, but reserved the determination for the discretion of the Grievance Committee and made its decision "final and binding" (J. A. 15-31). In 1964, Riss, supra was reaffirmed by this court in circumstances where the joint committee and the parties did not exceed their power under the contract and there was no fraud or breach of duty by the Union. "The decision of the Committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." Humphrey v. Moore, 375 U.S. 335, 351 (1964).

II. The doctrine of fair representation is not applicable to the Grievance Committee. The Committee is made up of an equal number of employer and Union representatives. In accordance with the labor contract and the facts in this case, a panel which is convened to hear and decide a particular dispute may not include any representative of the employer or Union who is involved. Neither the employers nor the Unions interest are represented on the joint committee and under no circumstances is any representative of the Grievance Committee an agent of the employee's exclusive bargaining representative.

The purpose of the Grievance Committee is to act as an impartial arbitration board to resolve labor disputes under the collective bargaining agreement. The duty of the Grievance Committee members who hear a grievance is to vote their convictions. There is no evidence in this record of any restrictions on members of the Grievance Committee which might in any way tend to require that they vote along "party" lines or that their vote was in any way predetermined or even predisposed. The Grievance Committee is vital to the collective bargaining agreement because it is the party's rational alternative to the economic weapons of the strike and lockout. It is in the interest of the parties to the labor contract to give the members of the Grievance Committee as much freedom as possible to function within the confines of the language of the agreement. The obligation of the Grievance Committee is not the duty of fair representation, but it is the obligation to apply and interpret the collective bargaining agreement

on a day-to-day basis.

The district court did not consider this issue because the Petitioners failed to articulate and brief the problem. The Third Circuit summarily rejected the argument by its silence. The Petitioners' novel theory is contrary to the mandatory language under this collective bargaining agreement and the facts in this case. Finally, the Petitioners are unable to present any precedent for such a theory.

III. The decision of the Grievance Committee did not lack procedural due process. The Petitioners did not raise this issue in the district court and therefore, it must be deemed to have been waived. Order of Railway Conductors v. Clinchfield RR Co., 407 F. 2d 985, 988 (C. A. 6, 1969). In essence, this argument is tied to the assertion that the duty of fair representation is applied to the Grievance Committee. According to the Petitioners, the employer representatives on the Grievance Committee necessarily vote for M & G's interest, but the Union representatives on such committee are neutralized because there are two groups of employees with clashing interests. Petitioners' argument is without foundation in the record. The Petitioners try to butress the argument by characterizing the Union's representation as "lackadaisical" and "perfunctory" (Petitioners' Brief, page 12). The Petitioners failed to mention that the Union agreed with the Eastern drivers and urged the Grievance Committee to dovetail the M & G and Eastern drivers based on the overall seniority of both groups of

employees (J. A. 415-417, 426-428). Further, it is noteworthy that in the Petitioners' Brief to the Third Circuit, they stated that Mr. Bottone, the Union's representative before the Grievance Committee, "proceeded to urge dovetailing and then spoke admittedly eloquently and persuasively about dovetailing in the past" (Petitioners' Brief to the Third Circuit, page 32).

The attack on the quality of the Union's representation is unwarranted as a matter of fact and incorrect as a matter of law. In Vaca v. Sipes, 386 U.S. 171 (1967) the Supreme Court reversed a holding of the Missouri Supreme Court that a jury could properly have found the union had arbitrarily failed to represent the plaintiff in the handling of his grievance by refusing to take his case to arbitration. "A breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

The union's duty of fair representation is the duty to refrain from "hostile discrimination" based on "irrelevant or invidious" considerations, or conduct which is "arbitrary, discriminatory, or in bad faith." Thus, to prove a breach of that duty, the record must show by substantial evidence that the union was motivated in its actions by hostility, malice or bad faith. Dill v. Greyhound Corp., 435 F. 2d 231 (C.A. 6, 1970). Proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation. Bazarte

v. United Transportation Union, 429 F. 2d 868 (C. A. 3, 1970). The union's duty is not a general duty of due care, as in the law of negligence, but only a duty of good faith. Brough v. United Steelworkers of America, 437 F. 2d 748 (C. A. 1, 1971); Walden v. Teamsters Local Union No. 71, 468 F. 2d 196 (C. A. 4, 1972). There must be more than an improper action by the union; the union must have acted with malice and bad faith. Brady v. Trans World Airlines, 401 F. 2d 87, 104 (C. A. 3, 1968). There is no such evidence in this case.

IV. The Grievance Committee's decision was rational. The collective bargaining agreement did not specify one particular solution, but reserved the resolution of the seniority dispute to the discretion of the Grievance Committee. That Committee's decision placing the Eastern drivers on the bottom of the M & G seniority list did not violate the labor contract. Neither did the decision disregard industrial experience in the car haul industry. The testimony before the Grievance Committee indicated that in the few cases in the car haul industry where a question of an absorbtion was involved, there were cases in which no carryover seniority was permitted (J. A. 115-132). cf. Andrus v. Convoy Company, 408 F. 2d 604 (C. A. 9, 1973) cert. denied, 414 U. S. 989 (1973).

A review of the Court decisions in the related but more experienced freight industry reveals that bottom (foot) of the list seniority is not at all uncommon or unusual. The following "bottom of

the list" seniority determined by joint committees were left undisturbed by the courts: Fuller v. Highway Truck Drivers Local 107, 428 F. 2d 503 (C.A. 3, 1970); Morris v. Werner-Continental, Inc., 466 F. 2d 1185 (C.A. 6, 1972); Williams v. The Kroger Company, 369 F. 2d 85 (C.A. 6, 1966); Ampagoomian v. Johnson Motor Lines, 331 F. Supp. 262 (DC, R.I., 1971); Brady v. Consolidated Freightways Corp., ____ F. Supp. ____(DC, Ohio, 1972), 82 LRRM 2245; Quinn v. Dixie Highway Express, Inc., ___ F. Supp. ____ (DC, Ala., 1972), 79 LRRM 2894; Smith v. Yellow Freight System, Inc., ___F. Supp. ____ (DC, Ohio, 1972), 79 LRRM 3079; Aff'd, -F. 2d 83 LRRM 2047 (6th Cir. 1972), Cert. denied 411 U.S. 966. Turley v. Hall's Motor Transit Company, 296 F. Supp. 1183 (DC, Pa., 1969); Brown v. Truck Drivers Local 355, 292 F. Supp. 125 (DC, Md., 1968), enf. 416 F. 2d 1333 (C.A. 4, 1969).

The fairest approach may have been to credit all employees with their total length of service in the industry or with these two companies. This would have required the Joint Committee to unravel all the alleged inequities of the past. Even the Eastern drivers were opposed to such an approach. cf. (J. A. 341, 369-379). The seniority problem in this case is more complex than appears on the surface, but in any event the courts should not prefer one method of seniority integration as against any other. Truck Drivers Local 568 v. NLRB (Red Ball Motor Freight, Inc.), 379 F. 2d 137, 142 (C. A. D.C., 1967). "Judicial Review of Grievance Committee Deci-

sions," 55 Va. L. Rev. 369 (1969); Dunan, "Three Problems in Labor Arbitration," 55 Va. L. Rev. 427, 438-439, 460 (1969).

CONCLUSION

For all of the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

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